No. 05-751

IN THE

Supreme Court of the United States

WILLIAM VAN POYCK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MOTION OF *AMICUS CURIAE* THE FLORIDA INNOCENCE INITIATIVE, INC. FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Florida Innocence Initiative, Inc., ("*Amicus*") hereby moves, pursuant to S. Ct. R. 37.2, for leave to file a brief *amicus curiae* in support of the petition for a writ of *certiorari* to the Supreme Court of Florida. Although both parties consented to *Amicus* filing this brief,* *Amicus* was unable to timely obtain Respondent's consent in writing. Accordingly, *Amicus* is filing this motion seeking leave of the Court.

As more fully explained at pages 1-2 of the attached brief under "Interest of *Amicus Curiae*," *Amicus* is a non-profit Florida corporation formed to pursue judicial relief for persons wrongfully imprisoned in Florida jails and prisons. Central to *Amicus*'s mission is advocacy for persons, like Petitioner, who have been sentenced to death on the basis of purported factual circumstances that, in reality, did not exist.

Amicus hopes this brief will assist the Court in determining whether to grant *certiorari* and respectfully requests that the Court grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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* In late January, Amicus spoke to Ms. Celia Terenzio, Assistant Attorney General for the State of Florida. Ms. Terenzio orally confirmed that the State had no objection to Amicus filing this brief in support of the petition for a writ of *certiorari*. This conversation was confirmed in writing by the Amicus in a letter dated January 25, 2006, which is submitted herewith. Counsel for Petitioner confirmed Petitioner's consent for the filing of this brief in writing in a letter dated January 4, 2006, which is also submitted herewith.

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INTEREST OF *AMICUS CURIAE*[1]

Florida Innocence Initiative, Inc. ("FII") is a non-profit Florida corporation formed to pursue judicial relief for persons imprisoned in Florida jails and prisons for crimes they did not commit. FII is patterned after, and works closely with, the Innocence Project, Inc., a non-profit legal clinic and criminal justice resource center founded by Professors Barry Scheck and Peter J. Neufeld in 1992. The Innocence Project operates with FII and many similar organizations throughout the country in what is known as "The Innocence Network." Since its formation, the Innocence Network has been responsible for saving scores of innocent persons from unjust imprisonment and execution.

The Innocence Network currently represents hundreds of prisoners seeking post-conviction DNA testing in multiple states throughout the nation. Scientific testing using forensic DNA technology has literally revolutionized the nation's criminal justice system in the last 15 years, providing a previously unavailable source of evidentiary proof with unparalleled reliability and probative weight. In a host of recent cases, post-conviction DNA testing has exonerated the innocent, and in many instances identified the true perpetrator, where the trial evidence against the defendant had been characterized by courts as "overwhelming."

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1. Pursuant to Rule 37.6 of this Court, the *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part. This brief was written by undersigned counsel. No person or entity other than the *Amicus* and its counsel made any monetary contribution to the preparation or submission of this brief. Amicus has obtained the consent of both parties to file this brief, but has filed a motion with the Court seeking leave to file because Amicus was unable to timely obtain Respondent's consent in writing.

Even when complete exoneration is not at stake, FII advocates on behalf of prisoners who have been wrongfully sentenced to death on the basis of purported aggravating factors that, in reality, did not exist. The present petition of William Van Poyck involves such a case. Mr. Van Poyck was sentenced to death by a jury that demonstrably believed he pulled the trigger of the gun that killed a corrections officer, during an ill-fated attempt by Mr. Van Poyck and another man to assist a friend to escape from a prison transport van. The DNA evidence Mr. Van Poyck now seeks to obtain could prove beyond doubt that he was *not* the triggerman, and that the jury's sentence was therefore affected by a fundamental misunderstanding of the facts relating to Mr. Van Poyck's crime. The Florida courts have unconscionably, and unconstitutionally, denied Mr. Van Poyck's application to obtain DNA testing and declared that the State can put Mr. Van Poyck to death oblivious to what the testing might show. The prevention of such a miscarriage of justice is the essence of FII's core mission.

INTRODUCTION

Florida Rule of Criminal Procedure 3.853 provides in pertinent part that a movant such as Petitioner is entitled to post-conviction DNA testing if he can demonstrate, *inter alia*, that "there is a reasonable probability that [he] would have . . . received a lesser sentence if the DNA evidence [being sought] had been admitted at trial." In denying Petitioner William Van Poyck's motion to obtain potentially mitigating DNA evidence, the Florida Supreme Court found that DNA evidence, even if it affirmatively established that Petitioner was *not* the triggerman, was immaterial to the Petitioner's death sentence. In so holding, the Florida court ignored the transformative effect that DNA evidence has at criminal trials

generally and the effect it would have had in this case specifically. The court also overlooked the critical distinction that prosecutors, judges, and juries draw between defendants who kill and defendants who lack the specific intent to kill and are not willful participants in the homicide committed by an accomplice. The resultant deprivation of Mr. Van Poyck's fundamental constitutional rights creates an urgent and compelling basis for this Court's review.

REASONS FOR GRANTING THE PETITION

By Failing To Acknowledge the Potential Power of the DNA Evidence Sought by Petitioner, The Florida Supreme Court's Decision Deprives Mr. Van Poyck of His Constitutional Right to a Fair Sentence.

Since it was first introduced in U.S. courtrooms in the late 1980s, *see* Sharon Begley et al., "Blood, Hair and Heredity," *Newsweek*, July 11, 1994, at 24, "DNA profiling has revolutionized forensic science and the criminal justice system," U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence To Establish Innocence After Trial*, at xv (1996). DNA evidence has exposed wrongful convictions, led to the vindication of innocent persons and established, to an unprecedented degree of scientific certainty, an individual's involvement or lack of involvement in a particular crime. *See id.* Forensic DNA technology is "qualitatively different from all [other forensic testing technology] that preceded it." *Harvey v. Horan*, 285 F.3d 298, 305 n.1 (4th Cir. 2002) (Luttig, J., concurring). Whereas scientific results of non-DNA forensic testing invariably leave ultimate interpretive issues for determination by juries at trial, currently available Short Tandem Repeat (STR) DNA testing can establish to a

"virtual certainty" whether a given individual did or did not commit a particular criminal act. *Id.* at 305.

The power of forensic DNA evidence not only has the capacity to exonerate beyond doubt wrongly convicted defendants but also registers in its heightened probative impact on juries. Because DNA evidence may, in certain circumstances, remove all doubt as to one or more otherwise disputed factual issues, such evidence can dramatically change the dynamics of a jury's deliberations. The proper measurement of the potential impact of DNA evidence by courts raises issues of undeniable constitutional proportions. Indeed, in the present Supreme Court Term, this Court is already considering the extent to which post-conviction DNA evidence that negates key "facts" relied upon by the State at a defendant's trial gives rise to valid claims of "actual innocence" requiring vacatur of a capital conviction. *See House v. Bell*, No. 04-8990. However that case is ultimately decided by this Court, *House* demonstrates this Court's recognition of the constitutional stakes involved where post-conviction DNA evidence objectively proves the falsity of critical "facts" presented to a jury at trial.

The claim raised by Petitioner William Van Poyck is a close cousin to the "false facts" scenario presented in *House*. Mr. Van Poyck was convicted and a recommendation for the death penalty was made by a jury that clearly believed it had heard sufficient evidence to find that he, not his co-felon Frank Valdes, had murdered Corrections Officer Fred Griffis in cold blood with a pistol at point-blank range. It is beyond dispute that this belief of the jury was without foundation, since the Florida Supreme Court, on Petitioner's direct appeal, overturned Mr. Van Poyck's conviction for first-degree premeditated murder on the grounds that the evidence

at trial was insufficient to sustain a finding that Petitioner was in fact the triggerman. *See Van Poyck v. State*, 564 So. 2d 1066, 1069-70 (Fla. 1990) (*Van Poyck I*). Although the Florida court upheld Petitioner's death sentence on the grounds that it was not disproportional under *Tison v. Arizona*, 481 U.S. 137 (1987), *Van Poyck I* did not consider the impact that indisputable proof that Mr. Van Poyck was not the triggerman would have had on the jury's sentencing recommendation, nor was this question presented on direct appeal. The *Van Poyck I* Court's conclusion that the death penalty was not unconstitutional under *Tison* did not answer the central issue implicated by the present petition – namely, whether there is a reasonable probability that the jury *would* have recommended the death penalty had it known beyond doubt that Mr. Van Poyck was *not* the triggerman.

The principle that, for purposes of imposing the death penalty, a defendant's "punishment must be tailored to his personal responsibility and moral guilt," *Enmund v. Florida*, 458 U.S. 782, 801 (1982), is not only ensconced in this Court's Eighth Amendment jurisprudence but also deeply embedded in community standards of fairness and decency. As this Court observed in *Enmund*: "Society's rejection of the death penalty for accomplice liability in felony murders is . . . indicated by the sentencing decisions that juries have made." 458 U.S. at 794. Moreover, one of the two principal social purposes purportedly served by the death penalty – deterrence – does not apply to those who do not themselves kill and whose crimes did not involve killing as "an essential ingredient." *Id.* at 799 (citing Model Penal Code §210.2, comment, p. 38 & n. 96). American juries rarely impose the death penalty upon defendants who have not personally killed or participated in a homicidal act. Indeed, as the Court in *Enmund* noted, the overwhelming majority (339 of 362) of

executions reported in appellate court decisions between 1954 and 1982 involved defendants who had personally committed homicide or deadly assault. *See id.*[2]

Florida juries rarely if ever recommend a death sentence for a defendant who was not himself the triggerman; did not hire or solicit someone to kill a victim; and did not engage in a scheme specifically designed to kill. *Id.* at 795. This pattern is at least as powerfully evident today as in 1982. In connection with the preparation of this amicus brief, FII conducted a review of the factual circumstances underlying the convictions of the 367 Florida inmates currently on death row. This review reveals that only 62 of these 367 inmates were sentenced to death based, either in whole or in part, on convictions for felony murder. *See* Florida Dep't of Corrections, "Death Row Roster."[3] Of the 62 inmates on death row for felony murder convictions, 53 physically caused another's death in the commission of a felony. *See* Appendix A, *infra*. Another eight of these inmates either ordered their accomplices to commit murder or expressed a specific intention of killing witnesses

2. In two additional cases, the person executed had another person commit the homicide for him, and in 16 cases the facts were not reported in sufficient details to determine whether the person executed committed the homicide. *Id.*

3. Roster available at http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited Feb. 16, 2006). Petitioner's name is not included on this roster, presumably because he is currently being held at a facility in Virginia and is not in custody of the Florida Department of Corrections. Because Mr. Van Poyck's guilt- and penalty-phase trial took place before a Florida jury, the sentencing patterns of juries in Florida, not Virginia, are most directly pertinent

(Cont'd)

prior to their crimes. See Appendix B, *infra*. In only one instance was the conviction that led to the death sentence not based on evidence presented at trial that the defendant had either killed or wantonly directed or planned an intentional killing during the course of the underlying felony.[4]

A closer review of this lone exception, however, demonstrates that it is no exception at all. As reported in *Pearce v. State*, 880 So.2d 561 (Fla. 2004), inmate Faunce

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here. In any case, if Virginia law applied, Mr. Van Poyck would plainly not be death-eligible as a non-triggerman. *See Hancock v. Commonwealth*, 407 S.E.2d 301, 307 (Va. Ct. App. 1991)

> Under [Virginia's] so-called "triggerman" rule, only the actual perpetrator of a crime delineated in Code § 18.2-31 may be convicted of capital murder and subjected to the penalty of execution, except in the case of murder for hire. One who is present, aiding and abetting the actual murder, but who does not actually fire the fatal shot, is a principal in the second degree and may be convicted of no greater offense than first-degree murder.

(citing *Frye v. Commonwealth*, 345 S.E.2d 267, 280 (Va. 1986)) (internal citations and quotation marks omitted)).

4. As the dozens of death-row inmates exonerated by subsequent DNA testing evidence can attest, the *reported* facts in these cases are not necessarily the real facts. Some of these inmates may have valid claims of actual innocence or other meritorious grounds for vacating their convictions or sentences. The review conducted by Amicus for this brief only characterizes the evidence before the juries in each of these cases, as reported in publicly available court decisions. Amicus does not intend to take any position in this Brief regarding the merits of any other inmate's claims for relief, nor should any such position be inferred.